STATE OF MICHIGAN
IN THE SUPREME COURT

On Appeal from the Michigan Court of Appeals:
Fitzgerald, P.J., and Bandstra, J. and Schuette, JJ.

ESTATE OF DANIEL CAMERON, by DIANE CAMERON & JAMES CAMERON, Co-GUARDIANS,

Plaintiffs/Appellants,

v.

AUTO CLUB INSURANCE ASSOCIATION,

Defendant/Appellee,

Supreme Court No. 127018

Court of Appeals No. 248315

Washtenaw Probate Case No. 02-549-NF
Hon. John N. Kirkendall

PLAINTIFFS/APPELLANTS' REPLY BRIEF

PROOF OF SERVICE

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ARGUMENT

I. THIS COURT SHOULD NOT CONSIDER ANY NEW LEGAL ISSUES WHICH WERE NOT ADDRESSED IN THE TRIAL COURT AND COURT OF APPEALS WHERE THE DEFENDANT/APPELLEE STIPULATED AND AGREED THAT THE ONLY DISPUTED ISSUE WAS WHETHER THE STATUTE OF LIMITATIONS BARRED THE PLAINTIFF'S CLAIM FOR ATTENDANT CARE BENEFITS.

The Defendant/Appellee in its brief raises new issues that were not presented at the trial court level and contrary to the stipulation that was reached between the parties. The Appellee argues that the incapacitated person is not the real claimant and therefore the tolling provisions of MCL 600.5851(1) would not apply to claims of the service provider. The stipulation and order dated April 8, 2003 was entered by the parties indicating that the amount of benefits at issue was $182,500.00. (See Appendix to Plaintiff/Appellant's Brief on Appeal, Exhibit B). The stipulation and order further reads as follows:

> "It is agreed that this stipulation settles the dispute as to the amount and the nature of the aide care benefits claimed leaving only the disputed issue as to whether the statute of limitations barred the claim for reasons set forth in Defendant's Motion for Summary Disposition."
>
> (Emphasis supplied)

* * *

The parties had agreed that attendant care should have been paid to Diane and James Cameron. The only relevant legal issue was whether or not the Defendant/Appellee could avoid their financial responsibility by arguing that the tolling provisions of MCL 600.5851(1) did not apply to no-fault claims.

The Defendant/Appellee argues that this Court may address this issue in it's discretion because this is a question of law and all of the facts necessary to it's decision are in the record. In reality, the Auto Club Insurance Company stipulated as to the amount of damages and agreed that the only legal issue was whether or not this cause of action was barred by the one year back provision found in MCL 500.3145(1). Therefore, the Defendant/Appellee has waived any challenge concerning the issue of whether the injured person is the claimant for purposes of tolling no-fault claims. This argument was not raised in the trial court and therefore is not properly before this Court. See S. Abraham and Sons, Inc. v Department of Treasury, 260 Mich App 1, 22 note 10; 677 NW2d 31 (2003). Although it is true that this Court may address an argument first raised on appeal if the issue concerns a question of law and where the facts necessary for it's resolution have been presented, the Defendant in this case is trying to argue an issue that was previously waived and which they stipulated was not an issue in this matter. Therefore, this Honorable Court should decline to consider Defendant's real party in interest argument which was not addressed by the trial court or Michigan Court of Appeals.

II. THE INSURANCE INSTITUTE RAISES COMPLETELY NEW LEGAL ISSUES WHICH WERE NOT RAISED BY THE PARTIES IN THIS MATTER AND ARE NOT PROPERLY BEFORE THE APPELLATE COURT PURSUANT TO MCR 7.212(H)(2).

MCR 7.212(H)(2) provides in the pertinent part as follows:

"H. Amicus Curiae

2. The brief is limited to the issues raised by the parties. An amicus curiae may not participate in oral argument except by court order."

* * *

Issues raised by an amicus brief which had not been raised by the Defendant are not properly before the Appellate Court. See Reynolds v Bureau of State of Lottery, 240 Mich App 84, 610 NW2d 597 (2000). Appeals are limited to the issues raised in the Application for Leave to Appeal. See MCR 7.302(G)(4)(a).

The only legal defense raised at the trial court and Court of Appeals concerned whether or not the one year back rule set forth in MCL 500.3145(1) is subject to the tolling provisions of MCL 600.5851(1). On April 8, 2003, the trial court granted summary disposition in favor of the Plaintiffs on this issue. The parties had stipulated that the amount of damages for past attendant care was $182,500.00. The parties had agreed that the Plaintiff's parents had provided attendant care to the minor child and had not been paid for the required services. The Defendant/Appellee filed it's appeal brief on November 25, 2003. The sole issue raised by the Appellee concerned the legal issue of whether or not the one year back rule set forth in MCL 500.3145(1) is subject to the tolling provisions of MCL 600.5851(1).

The Insurance Institute in it's amicus curiae brief raises new issues that were not presented at the trial court or Court of Appeals and contrary to the stipulation that was reached between the parties. The amicus curiae brief argues that the no-fault claims were not incurred expenses and therefore, the Plaintiff could not seek payment of no-fault benefits. The stipulation and order dated April 8, 2003 entered by the parties indicated that the amount of incurred benefits was $182,500.00. Ibid. The parties had agreed that attendant care should have been paid to Diane and James Cameron. The incurred legal issue was waived by the Defendant/Appellee. The only disputed legal issue was whether or not the Defendant/Appellee could avoid their financial responsibility by arguing that the tolling

provision of MCL 600.5851(1) did not apply to no-fault claims.

Therefore, pursuant to MCR 7.212(H)(2) and Reynolds v Bureau of State Lottery, 240 Mich App 84, 610 NW2d 597 (2000), the Plaintiff/Appellant would respectfully request that this Honorable Court to limit the appellate review to the issues raised by the application for leave to appeal and not consider new issues not considered by the trial court or Court of Appeals and completely contrary to the stipulation entered by the parties in this matter.

III. THE DEFENDANT/APPELLEE'S ARGUMENT THAT THE SERVICE PROVIDER IS THE "CLAIMANT" IS MISPLACED UNDER THE NO-FAULT ACT.

The Defendant/Appellee now argues that the claimant is the service provider and that the provider does not labor under the disability that would give rise to tolling pursuant to MCL 600.5851(1). The essence of this reply is that the injured person is always the "real party in interest" in a no-fault claim, pursuant to MCL 500.3112(1). Defendant-Appellee relies on Lomerson v Bujold, Ct. App. #231505 (June 25, 2002). Lomerson should not be followed for two reasons:

1. It is unpublished, and therefore not precedential.
2. It is irrelevant because it discusses damages in a legal malpractice claim. It does not discuss whether the service provider is a "claimant" under the No-Fault Law for purposes of tolling.

* * *

Defendant also relies on two pre-no-fault cases on the subject of whether RJA §5851 applied to derivative consortium claims: Walter v City of Flint, 40 Mich App 613; 199 NW2d 264

(1972), and Gumienny v Hess, 285 Mich 411; 280 NW 809 (1938). These cases held that where a minor is injured, the parents' consortium claim is separate and distinct for purposes of applying statute of limitations analysis. Whether or not Walter and Gumienny are correct in the context of Common Law consortium claims, they have no application to claims under the No-Fault Law. No-Fault claims are governed by MCL 500.3112. Defendant recognizes this statute and cites it, but focuses on the wrong language. The key language in determining who is the claimant, i.e., the "real party in interest," is contained within the following language in sec. 3112(1):

> "Personal protection insurance benefits **are payable to or for the benefit of an injured person or**, in the case of his death, to or for the benefit of his dependents."
>
> (Emphasis supplied)

* * *

In noting this language, Defendant/Appellee argues that service providers are the proper payees.

However, the service providers' right to claim no-fault benefits is ***derivative*** of the injured person's right to claim and receive no-fault benefits. There are several published cases that establish this precedent. The first is Geiger v DAIIE, 114 Mich App 283 (1982), lv den 417 Mich 865 (1983), which holds:

> "In the present case, even if we view the right to recover PIP benefits for medical expenses incurred during insured's minority as a separate cause of action belonging to the injured minor's parents, it is clear that the cause of action is derivative from the injured minor's rights under the insurance policy and the no-fault act. It is not an independent cause of action as was the case in Walter v City of Flint, supra." Id. at 288.

* * *

In Manley v DAIIE, 127 Mich App 444 (1983), modified on other grounds, 425 Mich 140 (1986), the Court of Appeals followed Geiger stating as follows:

> "In *Geiger*, the Court pointed out that claims such as those at issue here are arguably claims of the child rather than of the parents and that, to the extent that the parents have independent claims, the parents are 'claiming under' the child and so fall with the rule state in MCL 600.5851; MSA 27A.5851." Id at 456.

* * *

Geiger was again cited with approval in In Re Hales Estate, 182 Mich App 55 (1990);

> "Based upon the language of the no-fault act and the *Geiger* case cited above, we conclude that benefits payable under the no-fault act belong to the injured person . . . ." Id. at 58.

* * *

And again in Commire v Automobile Club, 183 Mich App 299; 454 NW2d 248 (1990):

> "The right to collect no-fault insurance benefits accrues to the injured person, even though another person may be legally responsible for the expenses incurred as a result of the injury." Id. at 302.

* * *

Defendant argues that Geiger and its progeny was wrongly decided. To the contrary, Geiger relies on the plain language of MCL 500.3112. This language is different than the common law rules of consortium claims at issue in Walter and Gumienny.

The injured person is always the real party in interest in a no-fault claim pursuant to §3112. Certainly, as a matter of procedural convenience, service providers may bring direct claims against a no-fault insurer. Lakeland Neurocare v State Farm, 250 Mich App 35; 645 NW2d 59, lv den 467 Mich 909 (2002). However, such claims can only exist derivatively. In other words, a service provider's right to claim no-fault benefits occurs only through the

injured person's entitlement to no-fault benefits. Thus, in the parlance of RJA §5851, the service provider "**claims under**" the injured person's right to bring an action for no-fault benefits. To hold otherwise would be to judicially amend the plain wording of RJA §5851. This argument is impermissible and should be rejected by this Court.

IV. THE DEFENDANT/APPELLEE'S ARGUMENT THAT THIS LEGAL ISSUE IS NOT ABOUT AFFORDING PROTECTION FOR THOSE PERSONS WHO NEED SUCH PROTECTIONS IS MISPLACED.

The Defendant/Appellee argues that the subject legal issue will not effect minors or mentally incompetent persons. Defendant further argues that the Plaintiff's position that mentally incompetent person or minor children will lose their right to recover benefits is a "cynical attempt to exploit their disabilities." The Defendant's argument could not be further from the truth. In the pending case of Dr. John R. Cotner and Barbara Krasny as Co-Conservators of Michael Gillespie, an Incapacitated Person v Farmers Insurance Exchange, et. al., Court of Appeals No. 259060, the Defendant Insurance Company has refused to pay benefits because the mentally incompetent person did not file an application for benefits within one year of the accident. As a result, the insurer has denied responsibility for payment of all medical and rehabilitation expenses arising out of the subject accident. Medicaid has now become the primary payor for this incompetent person's medical expenses. In addition, Mr. Gillespie's church and conservator, Dr. John Cotner, have subsidized many expenses which would normally be the responsibility of the no-fault carrier. If this Court affirms the Court of Appeals decision in Cameron, Mr. Gillespie will lose his right to claim no-fault benefits. There are many more examples of how this ruling will detrimentally effect the rights of incompetent

persons and minors in the context of no-fault cases.

In the circuit court case of Peter Rovenski as Guardian of Eric Rovenski v American Fellowship Insurance Company, Washtenaw County Circuit Court Case No. 99-5457-NF, Eric Rovenski, the incapacitated person, suffered a severe traumatic brain injury in a motor vehicle accident. He did not file a no-fault application within one year of the accident. As a result, the no-fault insurer denied responsibility for paying any no-fault benefits pursuant to MCL 3145(1). As a result of his disability, Mr. Rovenski ended up in multiple state hospitals including a three year stay in the Ypsilanti Forensic Center which was paid at the expense of Michigan tax payers and to the benefit of the no-fault insurer. The Michigan Department of Community Health and State Medicaid ended up subsidizing these medical expenses which should have been paid by the no-fault insurer. Further, the no-fault claimant was harmed since the type of care that he received in the Forensic Center was not at all comparable to the type of care he would have been entitled to had no-fault insurance coverage been available to him so that he could receive treatment in a traumatic brain injury rehabilitation program.

Yet, the Defendant/Appellee in this case argues that subject legal issue is simply a cynical attempt to protect the claims of attendant care providers. Ironically, although the Auto Club Insurance Association stands to save millions of dollars through this decision, Michigan insureds should not hold their breath when waiting for a return of premium payments or a reduction in no-fault insurance costs. If this Court does allow the Cameron precedent to remain as existing law, this decision will hurt mentally incompetent persons and minors who will, in many cases, forever lose their right to bring no-fault claims and this result will harm

those individuals who are in significant need of the protections of MCL 500.5851(1). Further, the State of Michigan will end up paying for medical expenses that were the responsibility of our no-fault system.

RELIEF REQUESTED

It is respectfully requested that this Honorable Court reverse the Cameron precedent for the above reasons and for the reasons fully set forth in Plaintiff/Appellant's Brief on Appeal.

Respectfully submitted:

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Dated: August 12, 2005

PROOF OF MAILING

STATE OF MICHIGAN)
) ss.
COUNTY OF WASHTENAW)

KRISTINA JOHNSON, being duly sworn, deposes and says that she is not a party to the above described litigation, and that she enclosed in an envelope two (2) copies of:

❑PLAINTIFFS/APPELLANTS' REPLY BRIEF

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Kristina Johnson
KRISTINA JOHNSON

Subscribed and sworn to before me on August 12, 2005.

Christa M. Rodriguez
Christa M. Rodriguez, Notary Public
Washtenaw County, State of Michigan
My commission exp: July 13, 2011
Acting in the County of Washtenaw

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